Filed 10/31/16 In re D.C. CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re D.C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.C., Defendant and Appellant.	F073310 (Super. Ct. No. 514017) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Valli K. Israels, Judge.

Elizabeth J. Smutz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Kane, Acting P.J., Poochigian, J. and Detjen, J.

Appellant D.C., a minor, appeals from the juvenile court's dispositional order declaring him a ward of the court. Following a contested hearing on a petition filed under Welfare and Institutions Code section 602, appellant was found to have committed an assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1).) Appellant contends the juvenile court erred by failing to exclude statements allegedly made in violation of appellant's *Miranda*[1] rights and because the evidence was insufficient to show an intent to commit assault. Because we agree the evidence was insufficient to support a conviction for assault, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

At the time of the alleged offense, appellant was an 11-year-old sixth grade student. On September 23, 2015, appellant was at a park near his elementary school with two friends, L.M. and J.R., who were also both 11 years old. An incident occurred at the park in which the victim, 12-year-old J.L., suffered a half-inch cut to his wrist. The whole thing started over a cookie.

The victim knew appellant, L.M., and J.R. as classmates from school, where they were all in the same class. The victim testified that he was at the park with his cousin when she offered him either a candy or a cookie, he could not remember which. As the cousin offered the cookie, J.R. interrupted the exchange, took the cookie, and ran off. The victim, believing this was a playful act, ran after J.R., laughing and chasing him. In the chase, the victim passed appellant, who was just standing there, with his back to the event. While passing appellant, the victim tripped on a tree root and began to fall. The victim reached out and grabbed appellant's backpack. Appellant then spun around to his left. The victim continued chasing J.R., not believing anything had happened and still viewing the incident as a joke.

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1 *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

Shortly after the stumble, appellant heard J.R. call out, instructing L.M. to "get the knife out." The victim stopped chasing J.R. and watched as L.M. reached into his backpack, pulled out a knife, and waved it in the air. This scared the victim, who looked at his hands and realized, for the first time, that he was bleeding. Appellant immediately ran home with his cousin, with J.R. and L.M. giving chase. As before, the victim said appellant was just standing there. The victim believed appellant had done nothing to him and saw nothing in his hands.

Both J.R. and L.M. testified regarding the incident as well. J.R. confirmed he went to the park with L.M. and appellant. While L.M. and appellant were off talking about a movie, J.R. took a package of cookies from the victim. He then ran over to L.M. and passed him the cookies, although L.M. immediately returned them to J.R. As J.R. was running, he saw the victim run up to appellant and "attack" him, hitting and pulling his backpack. According to J.R., as appellant tried "to get out of it" he accidentally cut the victim on the arm with "some kind of throwing knife" that L.M. had previously given to appellant. J.R. also said that L.M. later pulled out a different knife in order to stop the victim's cousin from hitting him in the head.

L.M. did not see J.R. steal the cookies, but confirmed J.R. ran up to him and appellant with cookies. L.M. also saw the victim run up to appellant and grab his backpack, at which point L.M. saw appellant turn around and cut the victim on accident. L.M. admitted to pulling a knife from his backpack after the victim was injured.

The court also received testimony from Modesto Police Officer Martin Lemus.[2] Officer Lemus interrogated appellant at his school the day after the incident. Appellant

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[2] Because we do not reach whether appellant's statements were taken in violation of appellant's *Miranda* rights, we do not recount the circumstances surrounding those statements here. We note that the appropriateness of considering Officer Lemus's testimony is contested in this matter. However, because the evidence is insufficient to support appellant's conviction even when considering Officer Lemus's testimony, we recount those statements for context.

stated he had seen J.R. take the victim's cookies and pass them to L.M., who gave them right back to J.R. Appellant also saw the victim chase after J.R. and L.M., and conceded that the victim had run after him as well. When the victim went after appellant and grabbed his backpack, appellant spun around and accidentally cut the victim with what appellant described as a "ninja star" he had in his hand. Appellant stated he had been given the weapon by L.M. while at school. The weapon was later retrieved from appellant's home, where it had been hidden in a shoe, after appellant told Officer Lemus where to find it.

Following this testimony, the juvenile court ruled on the three charges appellant was facing. The court found appellant did not commit a robbery with respect to the taking of the cookies because the court could not find beyond a reasonable doubt that appellant intended to aid and abet in the alleged robbery. The court also found appellant did not commit assault with force likely to cause great bodily injury, finding appellant's conduct of "holding the knife" and the fact "that he spun around with this knife" insufficient to support the charge. However, the court concluded appellant did commit an assault with a deadly weapon. With respect to that charge, the court found appellant "did an act that, by its nature, would directly and probably result in the application of force to a person," acted willfully in his conduct, and "was aware of facts that would lead a reasonable person to realize that his act, by its nature, would directly and probably result in the application of force to someone." Regarding the factual support for the assault, the court stated that when "the victim, pulled on the minor's backpack, he turned around or spun around with this knife in his hand and injured the victim," all the while knowing the dangerous nature of the weapon.

The court subsequently declared appellant a ward of the court, ordered him to serve 43 days in juvenile hall, for which appellant received 43 days' credit for time served, and placed appellant on probation. This appeal timely followed.

DISCUSSION

Appellant contends the evidence admitted is insufficient to support a finding that he had the requisite intent to commit any form of assault. In particular, appellant contends he did not commit an "intentional act" to harm another.

Standard of Review and Applicable Law

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. ' "The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 738-739.) "The applicable standard of review is the same as for adult criminal appeals." (*In re Amanda A.* (2015) 242 Cal.App.4th 537, 545.)

A conviction for assault with a deadly weapon requires proof of the crime of assault, plus proof that it was accomplished by the use of a deadly weapon. (Pen. Code, § 245, subd. (a)(1) ["Any person who commits an assault upon the person of another with a deadly weapon . . ."].) An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, § 240.) "The mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*People v. Colantuono* (1994) 7 Cal.4th 206, 214 (*Colantuono*).) In addition, "a defendant must 'actually know[ ] those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another.' " (*People v. Chance* (2008) 44 Cal.4th 1164, 1169.)

Insufficient Evidence Supports the Juvenile Court's Finding

The question at the heart of this case is what evidence supports the juvenile court's conclusion that appellant had the requisite intent to commit an assault. The whole of the People's analysis on this issue is the following:

> "Here, although close, the evidence is sufficient to establish the intent element of the crime of assault with a deadly weapon. As discussed *ante*, the court heard testimony regarding appellant's possession of a 'ninja star' and actually saw the weapon, which it described as 'a dangerous weapon.' [Citation.] It also heard testimony from J.L. and saw a demonstration of how appellant twisted toward him with the dangerous weapon in hand. Although the cutting itself may have been accidental, there was evidence from which the finder of fact could reasonably find that appellant made a willful movement toward J.L. with the knife in hand. Moreover, a finder of fact could reasonably find that turning toward someone with a sharp object in hand evidences an intent to commit 'an act that by its nature will probably and directly result in injury to another.' (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 214.)"

In this way, the People contend, as the juvenile court found, that the mere act of turning toward the victim with a knife in hand is sufficient to support a finding that appellant willfully committed an act that by its nature would probably and directly result in injury to another. We do not agree that the mere act of turning with a knife in hand, without more, is sufficient to support the factual conclusion that one had the intent necessary to commit an assault.

The *mens rea* required to commit assault has been a difficult concept to define, both in California law and generally, due to the crime capturing attempted criminal conduct but predating the development of the now extensive criminal doctrine covering attempts generally. (*People v. Williams* (2001) 26 Cal.4th 779, 784-785 (*Williams*).) However, despite that difficulty, the courts have maintained a relatively consistent understanding of the requisite intent needed to commit the crime. This consistency comes from the fact that, at its core, assault is a precursor offense to battery. (*In re James M.* (1973) 9 Cal.3d 517, 522 ["[s]ince its first session, our Legislature has defined

criminal assault as an attempt to commit a battery by one Having present ability to do so"]; *Colantuono*, *supra*, 7 Cal.4th at p. 216 ["Assault thus lies on a definitional, not merely a factual, continuum of conduct that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault."].)

Thus, while the People cite to *Colantuono* to support the trial court's conclusion, the truncated citation used misses the proper analysis. As shown in our discussion of the applicable law, *Colantuono* itself notes the historical connection to battery, explaining the requisite intent "is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*Colantuono, supra,* 7 Cal.4th at p. 214.) It goes on to explain that "upon proof of a willful act that by its nature will directly and immediately cause ' "the least touching," ' 'it is immaterial whether or not the defendant intended to violate the law or knew that his conduct was unlawful.… The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm. [Citation.] Because the nature of the assaultive conduct itself contemplates physical force or 'injury,' a general intent to attempt to commit the violence is sufficient to establish the crime." (*Id.* at p. 218.)

In a later clarification of these principles, our Supreme Court more directly tied the intent element of assault to the crime of battery, writing: "a defendant is only guilty of assault if he intends to commit an act 'which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences.' [Citation.] Logically, a defendant cannot have such an intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. [Citation.] In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*Williams, supra,* 26 Cal.4th at pp. 787-788.)

These cases all work to explain the longstanding principle that "the necessary mental state is 'an intent merely to do a violent act.' " (*Colantuono*, *supra*, 7 Cal.4th at p. 219.) "[W]here there is a clear intent to commit violence accompanied by acts which if not interrupted will be followed by personal injury, the violence is commenced and the assault is complete." (*People v. Yslas* (1865) 27 Cal. 630, 633.)

Recounting this principle, it is apparent that merely turning with a knife in hand is insufficient to demonstrate the proper intent. Possessing a knife and/or turning with it, is, in and of itself, not evidence of an intent to do a violent act or generate "the least touching." Nor can such intent be inferred from only such conduct, as the natural and probable consequences of such conduct are hardly the commission of a violent act. (See *Williams*, *supra*, 26 Cal.4th at p. 786 ["An assault occurs whenever ' "[t]he next movement would, *at least to all appearance*, complete the battery" ' "].) Indeed, far worse conduct has been described as insufficient to meet this requirement. (*People v. Carmen* (1951) 36 Cal.2d 768, 774-775, overruled on another point in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12 [if accepted as true, defendant's conduct of firing a gun to frighten others, without aiming at them and not in self-defense, "would fall short of assault with a deadly weapon (Pen. Code, § 245), or even assault (Pen. Code, § 240), if the jury believe his testimony that he had no intent to kill or injure anyone"].) To allow an inference of intent to commit violence from nothing more than possessing a weapon would criminalize many behaviors that are well settled as acceptable in society.

This conclusion does not resolve the matter, however, as we are bound to uphold the juvenile court if there is any evidence in the record which could support the court's findings. Indeed, in many cases evidence surrounding the reason why one turned with a knife in their hand, or otherwise possessed a weapon, could be more than sufficient to demonstrate intent to commit a violent act. (See *People v. Hood* (1969) 1 Cal.3d 444, 453 ["Thus, while it is not an assault to fire a gun in the air for the purpose of frightening another, it is an assault, without regard to the aggressor's intention, to fire a gun at

another or in the direction in which he is standing."]; *People v. McMakin* (1857) 8 Cal. 547, 548 ["As to what shall constitute evidence of such intention, is the question arising in this case. The ability to commit the offense was clear. Holding up a fist in a menacing manner, drawing a sword or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. So any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault."].)

In this case, we find no such additional facts. The evidence, even when taken in the light most favorable to the verdict, shows that appellant was not involved in the taking of the victim's cookies, was not participating in the chase that ensued, and, although aware that the victim was chasing after him too, was only brought into the event when the victim tripped and grabbed his backpack. Nothing in these facts supports the factual conclusion that appellant's resulting turn toward the victim evidenced an intent to do a violent act upon him or any intent to commit violence. It is thus a far cry even from those cases where minimally aggressive conduct supported an assault conviction. While it is readily apparent that appellant should not have possessed a knife and, unfortunately, a series of poor choices by appellant and his friends led to the injury of another, the facts here are insufficient to support a conviction for assault and, thus, the juvenile court's finding that appellant committed an assault with a deadly weapon cannot stand.

DISPOSITION

The dispositional order is reversed and this matter is remanded for further proceedings consistent with this opinion.